



Bank of America

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POLICY & RULES DIVISION

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FILE**

April 12, 1991

Federal Communications Commission
1919 M Street NW
Washington, DC 20554

Re: Security Interest in FCC Licensee's Rights

We understand you have asked for comments regarding proposals that the FCC clarify its policy and position regarding the ability of a creditor of a broadcast licensee to obtain a security interest in the licensee's rights under its FCC license.

We are aware that at least two Petitions for Declaratory Rulings on this issue have been filed 1/ and that at least one other may be filed, all of which go into detailed analyses of legal precedents. Rather than duplicate those efforts, we thought it might be useful to review with you some ideas that might allow the public interest and controlling legal principles to be reconciled with the needs of broadcasters and financial institutions extending credit to them.

1. In re Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License, filed February 21, 1991 (MMB File No. 91-0221A) (the "Hogan & Hartson Petition") and In Re Seller Financing of Broadcast Station Transfers, filed September 21, 1987 (MMB File No. 87-0921A) (the "Crowell & Moring Petition").

Clearly, no licensee owns the airwaves over which it broadcasts, or even the right to a perpetual license to use those airways. However, in every licensing situation, the relevant public authority must decide whether the licensee has the right to transfer its license, subject to the power of the agency to disapprove the transfer if the transferee does not meet established criteria. If the licensee is permitted to make such a transfer, that right - while not constituting ownership of the relevant public property - is a significant private property right that the licensee can realize for its benefit by selling or borrowing against its value. In the airline industry, for example, some airlines have alleviated substantial financial difficulties (and thereby been able to continue to render service to the public) by selling takeoff and landing 'slots' and international route authorizations.

In the broadcast industry, many licensees have financed acquisition of capital equipment to render or improve service by pledging stock and tangible assets to financial institutions. However, we understand some recent cases (Stephens Industries, Inc. v. McClung, 789 F. 2d 386, 390 (6th Cir. 1986) and In re Smith, 94 B.R. 220, 221 (Bankr. M.D. Ga. 1988) and In re Oklahoma City Broadcasting Co., d/b/a KGMC-TV, Debtor, 112 B.R. 425 (Bankr. W.D. Okl. 1990) have refused to recognize the validity of security interests in FCC licenses, to the detriment of the financial institutions that extended financing to the licensees in reliance on the value of the licenses. The adverse impact on the financial institution is explained in the Hogan & Hartson Application (p.4).

Before these cases, we had thought a lender might be able to obtain a meaningful security interest in the licensee's rights in the license (as distinct from a security interest in the license itself) by allowing a secured lender, in the event of a default by its borrower/licensee, to exercise the licensee's rights under existing regulations such as 47 CFR 22.39(c). That regulation (and comparable provisions for other types of broadcasters) allows a licensee to sell its stock or partnership equity to a new owner who would be subject to approval by the FCC in a proceeding in which the FCC "will not consider whether the public interest, convenience and necessity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee or assignee." (47 CFR 22.39(c)). I

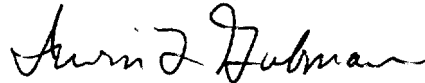
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enclose a copy of a summary of this analysis which we discussed with the FCC staff in April, 1983.

It is our suggestion that since there seems to be no question that the licensee has a protected economic interest in the FCC license, the licensee should be able to grant a meaningful security interest in those rights to a financial institution in order to obtain financing to operate or acquire its broadcasting business. Since the courts have cast doubt on the ability of the financial institution to protect itself from claims of other creditors, if the FCC perceives that the availability of secured financing is beneficial and wishes to provide a framework to give financial institutions the protection they need when the unsecured credit of the borrower is not sufficient, the FCC should establish procedures to allow the secured creditor to exercise its borrower's rights to transfer the FCC license, if the borrower defaults on its credit obligations.

Thank you for considering our views in this matter.

Sincerely yours,



Irwin L. Gubman
Senior Vice President and
Associate General Counsel

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BY COURIER



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April 1, 1983

APR 06 1991
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Marion MacRae, Esq.
Vice President
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Bank of America National Trust and
Savings Association
1800 K. Street, N.W.
Suite 900
Washington, D.C. 20006

Re: Security Interests in Operating Equipment
of FCC Licensees

Dear Marion:

I enclose the "talking papers" we discussed, together with copies of the FCC regulations and proposed financing agreement condition and covenant referred to therein. Please present these to the appropriate staff members of the FCC at your conference.

As we discussed, 47 CFR §22.39(c) gives us comfort that the FCC is not permitted to go to comparative hearings, but we need confirmation of that, assurance that private foreclosure is available under 47 CFR §22.39(d), and that we can obtain appropriate FCC order confirming our right to deal with the pledged stock of the licensee in the event of a financing agreement default.

Many thanks for all your help. If you need to reach me, please feel free to call me at home (415) 924-7615.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Peter'.

Peter Leiter

PL:sad
cc Richard G. Lyon
Elaine K. Randolph
William R. Nusbaum
Marie F. Hogan
Knox M. Cologne, III.
Irwin L. Gubman



SAN FRANCISCO HEADQUARTERS

April 6, 1983

Re: Effectiveness of Security Interest in
Cellular Mobile Telephone Systems

1. We plan to finance purchases of cellular mobile telephone system switching and base station equipment.

2. In case of a default, in order to realize the necessary economic value of the equipment, we need assurances that we can sell the equipment and all premises and facilities necessary to operate the equipment in commercial service at its original location.

3. Because the FCC operating license is required to operate the equipment at its original location, we need assurance that the FCC will agree to and sanction the transfer of control, and will not revoke the FCC operating license if we sell all the voting stock or partnership equity of the licensee to a new owner, provided only that the new owner has the financial and technical ability required under and otherwise complies with FCC regulations.

4. A licensed operator is permitted to sell its stock or partnership equity to a new owner under the change of control procedures authorized by 47 CFR 22.29 and 22.39. In such a proceeding the FCC "will not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." [47 CFR 22.39(c)]. We assume this policy is based on the judgment that this incentive to capital investment by the licensee serves the public interest.

5. We submit that as a pledgee of the stock or equity of a licensed operator we should also be permitted to sell to a new owner under procedures substantially the same as the owner/pledger.

6. We propose to require the owners of the licensee to pledge their stock or partnership equity to us as additional collateral for our financing. If a default occurs we would wish to have the right to sell the stock and the collateral by private (nonjudicial) foreclosure, at public auction or noticed

private sale, pursuant to the debtor protection requirements of the Uniform Commercial Code. A condition of sale would be that the buyer obtain all necessary FCC approvals. Our financing agreements would include a covenant by the licensee to join in the application of the buyer at our private foreclosure sale.

7. Subject to the informal advice we now seek, we anticipate asking for an opinion that under the FCC regulations applicable to cellular mobile telephone systems:

a) the FCC would permit us to sell and transfer ownership and control of a licensee as outlined above;

b) the FCC would not revoke, suspend or refuse to renew the FCC operating license without notice to us and a reasonable time to arrange for the sale of the pledged collateral and the licensing of the new owner as outlined above; and

c) the FCC would permit an amendment or supplement to the relevant application and will issue an appropriate order confirming the procedure outlined above.

8. If the procedures outlined above are not available, we then wish advice as to what other procedures may be available to protect the value of the operating assets of the licensee to a secured lender or finance lessor.

§ 22.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Except as provided in paragraph (b) of this section, applicants or any other parties in interest to pending applications shall comply with the provisions of this section whenever:

(1) They participate in any agreement (or understanding) which involves any consideration promised or received, directly or indirectly, including any agreement (or understanding) for merger of interests or the reciprocal withdrawal of applications; and

(2) The agreement (or understanding) may result in either:

(i) A proposed change in the ownership of an applicant which would be classified as a major amendment under § 22.23, and for which an exemption under § 22.31(e) from the "cut-off" rule would be requested; or,

(ii) A proposed withdrawal, amendment or dismissal of any application(s), amendment(s), petition(s), pleading(s), or any combination thereof, which would thereby permit the grant without hearing of an application previously in contested status.

(b) The provisions of this section shall not be applicable to any engineering agreement (or understanding) which:

(1) Resolves frequency conflicts with authorized stations or other pending applications without the creation of new or increased frequency conflicts; and

(2) Does not involve any consideration promised or received, directly or indirectly (including any merger of interests or reciprocal withdrawal of applications), other than the mutual benefit of resolving the engineering conflict.

(c) For any agreement subject to this section, the applicant of an application which would remain pending pursuant to such an agreement will be considered responsible for the compliance by all parties with the procedures of this section. Failure of the parties to comply with the procedures of this section shall constitute a defect in those applications which are involved in the agreement and remain in a pending status.

(d) The principals to any agreement or understanding subject to this section shall comply with the standards of paragraph (e) of this section in accordance with the following procedure:

(1) Within ten (10) days after entering into the agreement, the parties thereto shall jointly notify the Commission in writing of the existence and general terms of such agreement, the identity of all of the participants and the applications involved;

(2) Within thirty (30) days after entering into the agreement, the parties thereto shall file any proposed application amendments, motions, or requests together with a copy of the agreement which clearly sets forth all terms and provisions, and such other facts and information as necessary to satisfy the standards of paragraph (e) of this section. Such submission shall be accompanied by the certification by

affidavit of each principal to the agreement declaring that the statements made are true, complete, and correct to the best of their knowledge and belief, and are made in good faith.

(3) The Commission may request any further information which in its judgment it believes is necessary for a determination under paragraph (e) of this section.

(e) The Commission will grant an application (or applications) involved in the agreement (or understanding) only if it finds upon examination of the information submitted, and upon consideration of such other matters as may be officially noticed, that the agreement is consistent with the public interest, and the amount of any monetary consideration and the cash value of any other consideration promised or received is not in excess of those legitimate and prudent costs directly assignable to the engineering, preparation, filing, and advocacy of the withdrawn, dismissed, or amended application(s), amendment(s), petition(s), pleading(s), or any combination thereof. Where such costs represent the applicant's in-house efforts, these costs shall include only directly assignable costs and shall exclude the application of general overhead expenses. The treatment to be accorded such consideration for interstate rate

making purposes will be determined at such time as the question may arise in an appropriate rate proceeding.) An itemized accounting shall be submitted to support the amount of consideration involved except where such consideration (including the fair market value of any non-cash consideration) promised or received does not exceed one thousand dollars (\$1,000.00). Where consideration involves a sale of facilities or merger of interests, the accounting shall clearly identify that portion of the consideration allocated for such facilities or interests and a detailed description thereof, including estimated fair market value. The Commission will not presume an agreement (or understanding) to be *prima facie* contrary to the public interest solely because it incorporates a mutual agreement to withdraw pending application(s), amendment(s), petition(s), pleading(s), or any combination thereof.

§ 22.30 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of §§ 1.41 through 1.52;

(3) Contain specific allegations of fact (except for those of which official notice may be taken), which shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be *prima facie* inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contains a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) The Commission will classify as informal objections:

(1) Any petition to deny not filed in accordance with paragraph (a) of this section;

(2) Any petition to deny (or for other forms of relief) an application to which the thirty (30) day public notice period of § 22.27(b) does not apply; or

(3) Any comments on, or objections to, the grant of an application (other than the issuance of a license pursuant to a construction permit) where the comments or objections do not conform to either paragraph (a) of this section or other Commission rules and requirements.

(c) The Commission will consider informal objections, but will not necessarily discuss them specifically in a formal opinion if:

(1) The informal objection is filed at least one day before Commission action on the application; and

(2) The informal objection is signed by the submitting person (or his representative) and discloses his interest.

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cense or for involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved.

[44 FR 60572, Oct. 19, 1979, as amended at 45 FR 63492, Sept. 25, 1980]

§ 22.39 Transfer of control or assignment of station authorizations.

(a) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. The treatment to be accorded acquisition or disposition costs for interstate rate making purposes will be determined at such time as the question may arise in a rate proceeding.

(b) Requests for transfer of control or assignment authority shall be submitted on the application forms prescribed by § 22.11 of this chapter; and shall be accompanied by the applicable showings required by §§ 22.13, 22.15 and 22.40 of this chapter.

(c) In acting upon applications for transfer and assignment authority the Commission will not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(d) The Commission shall be notified in writing promptly of the death or legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of a corporation which is a permittee or licensee. Within thirty (30) days after the occurrence of such death or legal disability, an application in accordance with the provisions of paragraph (b) of this section shall be filed requesting consent to involuntary assignment of such permit or li-

§ 22.10 Considerations involving transfer or assignment applications.

(a) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses or construction permits whenever applications (except those involving a *pro forma* assignment or transfer of control) for consent to assignment of a common carrier construction permit or license, or for transfer of control of a corporate permittee or licensee, involve facilities which have been operated for less than two years by the proposed assignor or transferor. At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that the proposed assignor or transferor has not acquired an authorization or operated a station for the principal purpose of profitable sale rather than public service. This showing may include, for example, a demonstration that the proposed assignment or transfer is due to changed circumstances (described in detail) affecting the licensee or permittee subsequent to the acquisition of the permit or license, or that the proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests.

(b) If a proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests, any showing requested under paragraph (a) of this section shall include an additional exhibit which:

(1) Discloses complete details as to the sale of facilities or merger of interests;

(2) Segregates clearly by an itemized accounting, the amount of consideration involved in the sale of facilities or merger of interests; and

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(3) Demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction.

(c) For the purposes of this section, the two year period is calculated using the following dates (as appropriate): 1 or 2;

(1) The initial date of grant of the construction permit, excluding subsequent modifications;

(2) The date of consummation of an assignment or transfer, if the station is acquired as the result of an assignment of construction permit or license, or transfer of control of a corporate permittee or licensee.

§ 3.2.
(Limiting
Provision)

(1) a security agreement, in form and substance satisfactory to Lessor, duly executed, granting Lessor rights in such collateral as Lessor may require to secure Lessee's or any Guarantor's obligations to Lessor which shall include, in the case of Lessee's Parent, the following:

(i) a pledge of 100% of the [stockholders'] [partners'] equity interest in Lessee (which shall be otherwise free and clear of all liens and encumbrances) (the "Equity Interest"), provided that the voting rights with respect to the Equity Interest shall remain in Lessee's Parent at all times;

(ii) a provision that upon the occurrence of an Event of Default (as defined in Section 11 hereof) the Equity Interest may be disposed of only in a manner which would not restrict the sale thereof to Lessee's Parent or Lessor or to a person of either's choice, for example at public auction or private sale pursuant to published bid invitation;

(iii) a provision protecting Lessee's Parent against an unreasonably low sales price, for example the provisions of Section 9904 of the California Uniform Commercial Code;

(iv) a provision that any sale of the Equity Interest shall be contingent upon FCC approval of a license application filed by the buyer and Lessee;

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11.4 Upon the occurrence of an Event of Default, ~~at~~ ^{at} Lessor's request Lessee shall join in any FCC application pursuant to any agreement required under Section 3.2(1)(iv). Lessee agrees to pay on demand all costs and expenses incurred by Lessor (a) in connection with the preparation and administration of this Lease and any instrument or agreement required hereunder and (b) in enforcing this Lease and any instrument or agreement required hereunder and in connection with any refinancing or restructuring of the Lease in the nature of a "work-out", in each case including allocated charges, costs and expenses of Lessor's Legal Department and any other attorneys' fees, expenses or out-of-pocket costs incurred by Lessor ("Legal Costs").